IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.4560 OF 2007
IN
APPEAL (ST) NO.48 OF 2007
IN
MISCELLANEOUS APPLICATION NO.252 OF 2006
IN
MISCELLANEOUS APPLICATION NO.265 OF 2004
IN
R.A.E. & R. SUIT NO.3650 OF 1987

Mr.Digamber Parkhande. ...Petitioner.

vs.

1. Mr.Pannalal Tengri Gupta. ...Respondent.

Mr.N.P.Bhavsar, for Petitioner.

Mr.D.R.Shah i/b. Mr.D.R.Shah, for Respondent no.1.

CORAM: D.K.DESHMUKH J.

DATED: 29th October,2007.

P.C.:-

1. Rule returnable forthwith. By consent of parties taken up for final hearing. Heard the learned Counsel appearing for both the sides. There is a decree of eviction passed against the petitioner. He applied to set aside that decree under Order IX of the Civil Procedure Code. In that application, he has made an application for amendment of his application for setting aside the decree. That application has been rejected by the Trial Court by order dated 24.1.2007 by holding that as Rule 1 of Order 6 of C.P.C. defines the pleadings to mean plaint and written statement, the application for setting aside the decree is not the pleading and the provisions of Order 6 Rule 17 of C.P.C. do not apply. Against the order rejecting the application for amendment, an appeal was filed before the Appeal bench of the Small Causes Court. The Appeal bench agreed with the reasons given by the Trial Court and it also held that the appeal is not maintainable because it is a procedural order. It also held that the amendment as sought is not relevant for setting aside the ex-parte decree.

2. I have heard the learned Counsel appearing

for both the sides. Now it is clear that the power of the Court to permit amendment in the pleading is contained in Order 6 Rule 17 of C.P.C. Rule 1 of Order 6 of C.P.C. Defines the pleadings to mean plaint and written statement. But perusal of Section 141 of C.P.C. shows that the procedure provided in the Code in regard to suits is to be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The explanation to Section 141 of C.P.C. shows that the "proceedings" includes proceedings under Order IX, and therefore, it is clear that the procedure laid down in the Code in relation to suit is applicable to application made under Order IX of C.P.C. Section 141 of C.P.C. reads as under:-

> "141. Miscellaneous proceedings- The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
> (Explanation.- In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.)"

The application of the petitioner was under Order 9 of C.P.C., and therefore, the procedure applicable to the suit has been made applicable by Section 141 of C.P.C. to the application made under Order 9 of C.P.C. If that is so, the provisions of Order 6 Rule 17 of C.P.C. will also apply to the application made under Order 9 of C.P.C. Even assuming that the appeal Court is right in holding that the appeal is not maintainable because the order passed by the trial Court rejecting the amendment is procedural order, this Court can examine the legality of the order passed by the trial Court. So far as the reason given that the amendment is not relevant for deciding whether the ex-parte decree is to be set aside or not, in my opinion, the Courts below were not justified in going into the merits of the averments to be incorporated by the amendment. That inquiry has to be made after the amendment is carried out and after the other side files its reply.

3. Taking overall view of the matter therefore, in our opinion, the orders impugned in the petition are illegal and, therefore, are liable to be set aside. They are accordingly, set aside. The

application filed by the petitioner for amendment in the application filed for setting aside the ex-parte decree i.e. Miscellaneous notice no.252 of 2006 is granted. The petitioner is permitted to amend his application for setting aside the ex-parte decree as per the amendment at “Exhibit A” annexed to his Miscellaneous Notice no.252 of 2006. Amendment to be carried out within a period of six weeks from today. Rule is made absolute accordingly.

No order as to costs.

(D.K.DESHMUKH, J.)